No. 04-219

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In The

Supreme Court of the United States

RICHARD SHUMSKY,
Chief Probation Officer, Los Angeles County,

Petitioner,

v.

EDMUND Y. CHEIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

CHARLES M. SEVILLA
LAW OFFICE OF CHARLES SEVILLA
1010 Second Ave., Ste. 1825
San Diego, CA 92101-49026
Telephone: (619) 232-2222

Attorney for Respondent Chein

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED[1]

1. May petitioner for the first time assert in this Court the question of whether 28 U.S.C. § 2254(d) requires a more deferential form of federal review of *Jackson v. Virginia*, 443 U.S. 307 (1979) insufficiency of evidence claims than dictated by *Jackson,* when petitioner never presented that the issue to either the district court or the Court of Appeal, and neither court ruled on the issue?

2. Is the question of whether AEDPA's deferential review standard to *Jackson v. Virginia* claims worthy of review when the *en banc* majority, although not deciding the legal question because it was not raised, assumed AEDPA's deferential standard did apply and accordingly correctly reviewed the insufficiency questions under that standard as well as under *Jackson*?

3. Is petitioner's claim that the *en banc* majority inaccurately characterized the state statutory element of materiality itself erroneous given the unbroken line of California authority defining the materiality element as a statement that "could probably have influenced the outcome of the proceedings?"

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[1] Under Rule 15.2, respondent's Brief in Opposition is to argue misstatements of law in the petition or deficiencies "based on what occurred in the proceedings below." Because petitioner's issues are raised for the first time in this Court and premised on inaccurate statements of California law, respondent poses the questions based on these deficiencies.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Statement of the Case 1

Summary of Argument 3

Argument

1. This Court Does Not Review on Certiorari a Question Presented by the Petitioner for the First Time in This Court 5

2. There is no Circuit Split on This Issue 7

3. Given that the *En Banc* Opinion Assumed Without Deciding AEDPA's Deferential Review Standard Applied to the Case, This Case Poses No Certiorari Question Worthy of Review 9

4. The County and the Dissent Err in Stating the California Definition of "Materiality" 13

Conclusion 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Robertson, 520 U.S. 83 (1997) 5

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 5

Bledsue v. Johnson, 188 F.3d 250 (5th Cir. 1999) 8

Bronston v. U.S., 409 U.S. 352 (1973) 3

Clifford v. Chandler, 333 F.3d 724 (6th Cir. 2003) 8

Delta Airlines v. August, 450 U.S. 346 (1981) 5

Dockins v. Hines, 374 F.3d 935 (10th Cir. 2004) 9

Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004) 9

Farrington v. Senkowsi, 214 F.3d 237 (2nd Cir. 2000) 8

Hurtado v. Tucker, 245 F.3d 7 (1st Cir. 2001) 7

Jackson v. Virginia, 443 U.S. 307 (1979) ..... *passim*

Johnson v. Bett, 349 F.3d 1030 (7th Cir. 2003) 8

Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) 5

Ponnapula v. Spitzer, 297 F.3d 172 (2nd Cir. 2002) 8

Sams v. Smith, 2003 U.S. App. LEXIS 16086 (6th Cir. 2003) 8

Sanford v. Yukins, 288 F.3d 855 (6th Cir. 2002) 8

Santellan v. Cockrell, 271 F.3d 190 (5th Cir. 2001) 7, 8

Sexton v. Kemna, 278 F.3d 808 (8th Cir. 2002) 8

U.S. v. Gaudin, 515 U.S. 506 (1995) 17

TABLE OF AUTHORITIES – Continued

Page

United States ex rel Petillo v. New Jersey, 400 F. Supp. 1152 (D.C.N.J. 1975) 3

United States v. Ortiz, 422 U.S. 891 (1975) 6

Weston v. Dormire, 272 F.3d 1109 (8th Cir. 2001) 8

Wiggins v. Corcoran, 288 F.3d 629 (4th Cir. 2002) 7

Youakim v. Miller, 425 U.S. 231 (1976) 5

STATE CASES

In re Braynard, 199 P.2d 576 (1921) 14

In re Imbler, 387 P.2d 6 (1963) 14

People v. Agnew, 176 P.2d 724 (1947) 14

People v. Barry, 314 P.2d 531 (1957) 14

People v. Davidson, 38 Cal. Rptr. 660 (1964) 14

People v. DiGicomo, 14 Cal. Rptr. 574 (1961) 14

People v. Feinberg, 60 Cal. Rptr. 2d 323 (1997) 17

People v. Grider, 19 Cal. Rptr. 41 (1962) 14

People v. Hedgecock, 795 P.2d 1260 (1990) 14, 17

People v. Jimenez, 15 Cal. Rptr. 2d 268 (1992) 14

People v. Kobrin, 903 P.2d 1027 (1995) ..... *passim*

People v. Kriton, 166 P.2d 45 (1946) 14

People v. Macken, 89 P.2d 174 (1939) 14

People v. Matula, 342 P.2d 252 (1959) 14

People v. McRae, 63 Cal. Rptr. 854 (1967) 14

People v. Pierce, 423 P.2d 969 (1967) 14, 16, 17

TABLE OF AUTHORITIES – Continued

Page

People v. Pustau, 103 P.2d 224 (1940) 14

People v. Rubio, 17 Cal. Rptr. 3d 524 (2004) 15, 16

In re Wright, 144 Cal. Rptr. 535 (1978) 14

STATUTES

28 U.S.C. § 2254(d) ..... *passim*

Cal. Penal Code section 123 ..... 15, 16, 17

STATEMENT OF THE CASE

Respondent Chein filed a habeas petition in the Central District of California challenging his state conviction for three counts of perjury. Among the issues raised, respondent Chein asserted that there was insufficient evidence to support the elements of the perjury offenses because the evidence could not reasonably support a finding of guilty beyond a reasonable doubt under *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

The charges stemmed from allegations of perjury over his credentials in his testimony in a car accident case in which he testified as a treating physician. Appellant was a licensed California medical doctor who had successfully completed a residency at the University of Southern California in Physical Medicine and Rehabilitation. The charges were based on his statements about the nature of his speciality upon completion of his residency, how many offices he had, and the name of his medical school.

In responding to an Order to Show Cause issued by the district court, petitioner, Los Angeles County Chief Probation Officer Shumsky [hereafter referred to as the County, or petitioner], filed a Return that argued *Jackson v. Virginia* was the proper standard for review of the insufficiency claims, and did not argue that AEDPA's more deferential standard applied to petitioner's *Jackson* claims.

The Magistrate's Report and Recommendation [R&R] reviewed the insufficiency claims under a *Jackson v. Virginia*, 443 U.S. 307 (1979), standard. Although mentioning AEDPA's deferential review standard (A.-59), the R&R cited *Jackson* as the controlling rule (A.-60), and then reviewed *de novo* each count and concluded: "Thus, this Court cannot conclude that no rational trier of fact

could have found proof of guilt beyond a reasonable doubt." A.-68. The R&R was adopted by the district court. A.-77. Respondent appealed.

Before the three-judge panel in the Court of Appeals, the County's position was again that the standard of review for the insufficiency claims was a straight *Jackson v. Virginia*, 443 U.S. 307 (1979), standard.

The three-judge panel majority opinion voided two of the three convictions for insufficiency and upheld only one count, the "offices" count. A.-95. Again, the standard used was *Jackson* and in upholding the one count, the panel majority held that "a reasonable juror could conclude that Chein's testimony at trial that he only had one office location was materially false." A.-94 The dissent agreed that the two counts should be voided for insufficiency, but also would have voided the third count for insufficiency of evidence. A.-109.

Respondent Chein filed a petition for rehearing and rehearing *en banc,* which was granted. One of the issues raised in the petition for rehearing was the insufficiency claim to challenge the remaining perjury count. In the County's Brief in Opposition to the grant of a rehearing, the insufficiency argument was not addressed.

The Court of Appeal granted *en banc* review. At no time did the County argue to the *en banc* court that the habeas standard of review for insufficiency should be the other than the straight *Jackson v. Virginia*, 443 U.S. 307 (1979), standard. That the AEDPA-*Jackson* issue was not raised in any pleadings or decided by the district court or the panel opinion is noted in the majority *en banc* opinion. A.-120. The majority opinion stated that both sides argued the insufficiency claims should be decided under a straight

Jackson standard of review. However, the majority, without deciding the legal issue, applied AEDPA's more deferential standard and held that under it, or straight *Jackson*, the counts were grounded in constitutionally insufficient evidence.

For the first time in this litigation, petitioner argues to this Court, contrary to the legal position presented to the district court and the Court of Appeals, that the standard for habeas review for an insufficiency of evidence claim is not straight *Jackson,* but rather whether the state court was reasonable in finding the evidence sufficient under *Jackson.*

The Circuit majority, which assumed AEDPA applied and ruled under it (and under a straight *Jackson*), faithfully applied California law of perjury, and found that the California Court of Appeal unreasonably concluded the evidence was sufficient. There is no "conflict" of Circuits on the issue, as the majority opinion's application of AEDPA to the issue does not conflict with opinions of other Circuits.

SUMMARY OF ARGUMENT

Perjury is an offense quite susceptible to selective prosecution. Seldom will witnesses for the State be subject to it, no matter how blatantly inconsistent their testimony. *See United States ex rel Petillo v. New Jersey*, 400 F. Supp. 1152, 1183 n.16 (D.C.N.J. 1975). The primary safeguard for errant testimony is cross-examination. *See Brŏnston v. U.S.*, 409 U.S. 352, 360 (1973). Here, a sitting judge in a civil case referred this case for prosecution and then became the State's star witness as its perjury expert,

claiming to the jury that alleged discrepancies in respondent's testimony about his credentials were material perjury. See A.-131, n.6.

To forestall insubstantial selective perjury prosecutions, California law requires that an alleged falsity be proven material, that is, that the false statement be able to probably affect the outcome of the case. None of the three statements in question came close to meeting that standard.

Petitioner seeks review of a question not decided below concerning AEDPA review of *Jackson* claims. But petitioner is barred from raising this claim because petitioner did not raise it below. In fact, petitioner informed the federal courts that the *Jackson* review standard alone was the proper standard. The Court of Appeal noted this deficiency and did not decide the question petitioner now poses. Instead, without deciding the issue, the court applied AEDPA and *Jackson*. There is no conflict in the Circuits on this issue.[2]

Finally, petitioner criticizes the majority opinion for using an alleged incorrect California definition of materiality. As will be shown, it is petitioner who has erred as a solid wall of California cases over the last eighty years used the definition correctly applied by the majority opinion.

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[2] Petitioner asserts a conflict, but the cases it cites do not support the contention. One set of cases applies AEDPA to *Jackson* claims. The other cited cases do not discuss the issue (perhaps because, as here, the State never presented the issue to the federal courts), and simply apply *Jackson*. A.-10-11.

ARGUMENT

1. This Court Does Not Review on Certiorari a Question Presented by the Petitioner for the First Time in This Court.

A "question presented in [a] petition but not raised in court of appeals is not properly before us." *Delta Airlines v. August,* 450 U.S. 346, 362 (1981). Although this court has the power to do so, "ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). As this court stated in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001), it does not grant review to decide constitutional questions not raised by the parties or decided in the case by the lower courts:

> "Mindful that this is a court of final review and not first view," *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 399, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996) (GINSBURG, J. concurring in part and dissenting in part), we thus decline to reach the merits of petitioner's present challenge. Petitioner points out that this case presents questions of fundamental national importance calling for final resolution by this Court. But the importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary, "by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process." *Adams v. Robertson*, 520 U.S. 83, 92, n.6, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997) (per curiam) (internal quotation marks omitted). We also "ensure that we are not tempted to engage in ill-considered decisions of questions not

> presented in the petition." *Izumi Seimitsu,* supra, at 34. *Id.* at 110-111.

The County, having urged the *Jackson* standard in both the district court and appellate courts, and the issue it now presents not being decided by those courts, there is no reason for this Court to alter its practice of declining to review questions on certiorari not presented to the lower courts.

For example, in *United States v. Ortiz,* 422 U.S. 891, 898 (1975), the government attempted to argue a legal position concerning checkpoint searches that it had not taken in the lower courts. This Court held: "Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in *Bowen* would be 'determinative of the issues in this case.' We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."

Similarly, the County argues a legal question (AEDPA review of *Jackson* claims) that it not only did not raise below, but took a position before the lower courts that straight *Jackson* was the appropriate standard of review to resolve the insufficiency questions.

This deficiency did not escape the attention of the majority *en banc* opinion. It discussed the failure of the parties to raise the issue now presented by the County and noted that such an issue, if considered, would require pleadings and judicial evaluation of several subissues:

> The parties to this case and the original three judge panel assumed, without analysis, that *Jackson* applies as written. There has therefore been no briefing in this case, and no judicial

> analysis, concerning the proper intersection of *Jackson* and AEDPA, or whether it is *§ 2254(d)(1)* or *§ 2254(d)(2)* that applies to *Jackson* substantial evidence review under AEDPA. As will appear, we would reach the same result in this case were we to follow *Davis* and *Turner* or, instead, ask whether the California Court of Appeal reasonably applied the *Jackson* standard. We therefore do not consider the question concerning the impact, if any, of AEDPA on the *Jackson* standard. A.-120.

The *en banc* majority opinion thus did not decide, and left open, the question of whether AEDPA's deferential review standard applies to *Jackson* claims, and if so, under which subsections of the statute. However, it concluded that the outcome of its review of the insufficiency questions in respondent's case *would not be different* if AEDPA's deferential review standard were applied to the assessment of the state court of appeal *Jackson* ruling.

Because the issues the County presents here have never been briefed below and thus neither the district court nor the Court of Appeals ruled on the issue, review should be denied. This Court is not the proper place to commence review of constitutional issues not raised or decided in the lower courts.

2. There is no Circuit Split on This Issue.

Petitioner asserts a conflict between Circuits. Pet. 5-7. There is none. The cases cited do not support the contention. One set of cases petitioner cites applies AEDPA to *Jackson* claims. *Hurtado v. Tucker,* 245 F.3d 7, 16 (1st Cir. 2001); *Wiggins v. Corcoran,* 288 F.3d 629, 637 (4th Cir. 2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir.

2001); *Sanford v. Yukins*, 288 F.3d 855, 863 (6th Cir. 2002); *Johnson v. Bett,* 349 F.3d 1030, 1034 (7th Cir. 2003); *Weston v. Dormire,* 272 F.3d 1109, 1112 (8th Cir. 2001).

The other cases cited by petitioner simply do not discuss the issue. They apply *Jackson* to deny relief to the petitioner, but there is no holding in any of them that AEDPA does not apply. The cases simply don't mention AEDPA. *See Farrington v. Senkowsi*, 214 F.3d 237, 240-241 (2nd Cir. 2000) (affirming the denial of relief); *Bledsue v. Johnson,* 188 F.3d 250 (5th Cir. 1999) (reversing a district court grant of relief under *Jackson*); *Clifford v. Chandler*, 333 F.3d 724, 728 (6th Cir. 2003) (affirming denial of relief); *Sexton v. Kemna,* 278 F.3d 808, 814 (8th Cir. 2002) (affirming denial of relief by the district court which concluded the record supported the state court of appeal's assessment of the evidence). These are cases where the State apparently never presented the AEDPA issue to the federal courts, and the courts simply applied *Jackson.* A.-10-11.

However, when the issue has been addressed in each of these purported "conflict" Circuits (the 2nd, 5th, 6th and 8th), AEDPA *was applied* to the *Jackson* claim. *See Ponnapula v. Spitzer,* 297 F.3d 172, 180 (2nd Cir. 2002) ("petitioner has failed to demonstrate that the state court's finding of sufficient evidence of his intent to commit larceny amounted to an unreasonable application of clearly established federal law as required by 28 U.S.C. § 2254(d)(1)."). The Fifth Circuit applied AEDPA in *Santellan, supra,* even though its earlier *Bledsue* case did not discuss *AEDPA.* The Sixth Circuit applied AEDPA to a *Jackson* claim in an unpublished ruling, *Sams v. Smith,*

2003 U.S. App. LEXIS 16086 (6th Cir. 2003).[3] The Eighth Circuit also applied AEDPA to a *Jackson* claim in *Evans v. Luebbers,* 371 F.3d 438, 441 (8th Cir. 2004).

Thus, petitioner's cases show no split of authority on the issue of AEDPA review of *Jackson* claims. The instant case does not present one either. Petitioner has cited no case where a court has *held* that AEDPA deference is not accorded to *Jackson* habeas claims. The best that can be said for petitioner's "conflict" cases is that they merely reflect instances where AEDPA was not raised, or not decided.

These cases do show, however, that there are legal questions on how AEDPA would be applied to a *Jackson* claim. Is it a factual issue under 2254(d)(2), or a legal question one under §(d)(1)? *Dockins v. Hines*, 374 F.3d 935, 939 (10th Cir. 2004); *see* A.-120, the *en banc* opinion noting the issue. But petitioner, not having raised an AEDPA issue below, is not entitled to review of it here.

3. Given That the *En Banc* Opinion Assumed Without Deciding AEDPA's Differential Review Standard Applied to the Case, This Case Poses No Certiorari Question Worthy of Review.

The *en banc* majority opinion found insufficiency of evidence supporting the three perjury counts under straight *Jackson* review as well as by assuming the AEDPA review standard applied. The opinion specifically

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[3] Under Sixth Circuit Rule 28(g), unpublished decisions may be cited as authority. Although disfavored, such cases may be cited in the Sixth Circuit when deemed precedential.

reviewed the assessments of the state court of appeal, and found them unreasonable under AEDPA in finding sufficient evidence under *Jackson*. See nn.5, 7 and 8 at A.-130, 137, 138.

Thus, the County's second issue in its petition, which asks this Court to grant certiorari to assess whether the state court finding of sufficiency of evidence was a reasonable application of *Jackson* is a request for review for correctness of an AEDPA application to an insufficiency of evidence question. That is not an issue worthy of the *certiorari* of this court especially when the petitioner's premise of faulty application of the review standard is based on its own serious misunderstanding of the California definition of the element of materiality (discussed in the next section).

Respondent briefly addresses why the evidence was so clearly insufficient as to make the state findings of sufficiency an unreasonable application of *Jackson*.

As to the specialty count, the State's doctors testified that the term "specialty" has several acceptable meanings. They preferred that a doctor use the term to mean a discipline in which one is American Medical Association (AMA) board-eligible after residency training. They also agreed that the more general AMA-approved definition – a speciality denoting advanced training in a specific area – is also an acceptable meaning. A.126. The panel opinion agreed that this count failed because the debate over Dr. Chein's testimony was "semantic hair splitting."[4] The *en*

[4] The Appendix has inadvertently omitted pages from the panel opinion where it unanimously found insufficiency on the specialist count. See A.-92-93. See A.-109.

banc majority found insufficiency. It did not have to address the issue of respondent's testimony being literally true (he *was* a "specialist" under the AMA definition). He gave accurate testimony on his training in his residency in Physical Medicine and Rehabilitation at the University of Southern California, and that he had done no surgery since finishing that residency. The *en banc* majority held that reviewing the complete testimony, there was no rational way a jury could find material the statement about his specialty as it could not have influenced the outcome. A.-127. The thrust of respondent's testimony was that the plaintiffs in the auto accident would require surgery, an opinion that was unquestionably within his expertise, as his mentor, Dr. Caillet, testified. A.-128.

In the context of respondent's testimony about his credentials before the jury, the difference between the State's version of truth and what respondent testified was so minor as to make a finding that it could probably have influenced the result irrational, and render unreasonable an appellate court finding of sufficiency. This result is even more true when factored into the sufficiency calculus is the prosecution position that no accident producing injuries occurred. This renders even more insignificant the alleged materiality of respondent's specialty statement. See A.-129-130.

As to the "offices" count, as the majority opinion states, the only witness on materiality was Judge Altman and the thrust of his testimony was his concern that if a doctor practices out of several offices, he may be the type who does not actually see patients. As the majority opinion states, no rational jury could find that a doctor who practices out of four locations in Los Angeles County is thereby unlikely to have seen his patients. A.-136. The

California Court of Appeal conclusion finding *Jackson* sufficiency is unreasonable because it did not assess Judge Altman's materiality testimony on the issue. A.-137, n.7.

As to the interrogatory count, the panel opinion unanimously found this count insufficient because "[t]here is no evidence in the record that the location of Chein's medical school was material to any of the issues in the case." A.-94. The *en banc* majority agreed that in a fraud and contract dispute between business associates, such a difference in school description in an interrogatory could not have influenced the outcome of the case. (The *en banc* dissent elected not to address this count. A.-150.)

Assessing how an interrogatory answer could affect the outcome of a lawsuit which the plaintiff dismissed (RT 1066-1067; ER 158-159) without it progressing even to the deposition phase is difficult. Respondent had written in answer to the question of where he obtained his education as: "The American University School of Medicine, Florida." The complete answer would have been: "American University of the Caribbean School of Medicine," adding that all records for American students, such as respondent, were kept at the medical school's Coral Gables, Florida office. RT 931-932; ER 148-149. The plaintiff recipient of the interrogatory did not deem the information material enough to investigate it either by contacting Florida school officials or simply contacting the California Medical Board. Had he done so, he would have obtained complete information. RT 974; ER 150.

Had the case progressed in discovery to deposition and trial and had respondent been asked about it, he would have been able to explain that if one wanted his records for attendance at the medical school, one would need to

contact the school's office in Florida. Further, as the plaintiff's attorney testified, this was a lawsuit between the plaintiff chiropractor and respondent doctor who had successfully completed his residency at U.S.C. He testified, "[t]he source of the dispute primarily concerned what we believed to be an unfair accounting over patient files. . . . " RT 1025; ER 151. It was an issue of, "Who owes what to whom." RT 1047; ER 155. When asked, even plaintiff's counsel could not articulate that it would probably have effected the outcome of the case. RT 1047; ER 155.

Finally, as the majority opinion correctly states, materiality is an important element of a perjury charge in California. Without it, mere falsity could be charged as perjury. That is not California law. Without a showing that the falsity could probably affect the outcome of the proceeding, "the crime would be false swearing rather than perjury." *People v. Kobrin,* 903 P.2d 1027, 1033 (1995).

4. The County and the Dissent Err in Stating the California Definition of "Materiality."

The County's petition erroneously criticizes the *en banc* majority for purportedly misconstruing the California definition of the materiality element of perjury. The County then applies its erroneous definition of the materiality element to argue that each count of conviction was supported by sufficient evidence of materiality.

It is the County that has erred.[5] The County informs the Court that the California definition of the perjury

[5] The dissent makes the same error in the lengthy footnote criticizing the majority for (accurately) describing the California definition of materiality. *See* A.-142-144, n.2. *See also* A.-149, the

(Continued on following page)

materiality element is when a false statement "might" have affected the verdict. Pet. 16. The County then proceeds to argue the sufficiency of each count under its erroneous "might have" standard. *Id.* at 17, 18, 20. The County has misstated California law.

California statutory and case law defines materiality just as the *en banc* opinion stated and as California courts have uniformly held: "The test is whether the statement *could probably have influenced the outcome* of the proceedings." *People v. Pierce,* 423 P.2d 969, 975 (1967) (italics added); *accord In re Imbler,* 387 P.2d 6, 11 (1963); *People v. Matula*, 342 P.2d 252, 254 (1959); *People v. Hedgecock*, 795 P.2d 1260, 1265 (1990); *People v. Jimenez*, 15 Cal. Rptr. 2d 268, 272-273 (1992); *In re Wright*, 144 Cal. Rptr. 535, 549, n.5 (1978); *People v. McRae*, 63 Cal. Rptr. 854, 863 (1967); *People v. Davidson*, 38 Cal. Rptr. 660, 662 (1964); *People v. Grider*, 19 Cal. Rptr. 41, 43 (1962); *People v. DiGicomo*, 14 Cal. Rptr. 574, 581 (1961); *People v. Barry,* 314 P.2d 531, 541 (1957); *People v. Agnew*, 176 P.2d 724, 729 (1947); *People v. Kriton*, 166 P.2d 45, 48 (1946); *People v. Pustau*, 103 P.2d 224, 227 (1940); *People v. Macken,* 89 P.2d 174, 179 (1939); *In re Braynard*, 199 P.2d 576, 578 (1921).

Against this wall of authority, petitioner cites no case except for the unpublished court of appeal discussion in this case. Pet. 15-16. This, too, is error. Both the trial court and the court of appeal used the correct definition of materiality. The majority *en banc* opinion was correct in its characterization of California law.

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dissent's doubting that the Judge Altman testimony on the office count would sustain materiality, but concluding the false statement "might have" been used to affect the proceeding. A.-149-150. Again, the "might have" standard is wrong.

The trial court twice instructed the jury pursuant to the pattern CALJIC [*California Jury Instructions, Criminal*] instruction (noted at A.-127) under the "could probably" definition of materiality: *1)* "A false statement is material if it could probably have influenced the outcome of the proceedings in which it was uttered." RT 1286. *2)* "A false statement is material if it could probably have influenced the outcome of the proceedings in which it was uttered." RT 1291.

It was no surprise then that the California Court of Appeal, in its unpublished opinion in respondent Chein's appeal, also used the "could have" standard. The state court ruled on the first two counts that "[t]he jury could reasonably conclude defendant's testimony was material to the outcome . . ." and "[t]he jury could reasonably conclude this false testimony was material to the outcome. . . ." A.-19.

On the last count, the state trial court told the jury: "[t]he jurors could conclude defendant's interrogatory answer was material to the outcome of that case. . . ." It also said: "[t]he false interrogatory answers . . . might have been used to affect the proceeding. (§ 123;[6] *see People v. Kobrin, supra*, 11 Cal. 4th at p. 420.)" A.-20.

Finally, the California Court of Appeal, as recently as August 18, 2004, reiterated the "could have influenced" definition of materiality for perjury cases. *People v. Rubio,* 17 Cal. Rptr. 3d 524 (2004). The Court of Appeal noted the

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[6] Referring to Cal. Penal Code section 123, which reads: "it is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, *and* might have been used to affect such proceeding." Emphasis added.

en banc opinion in this case, finding it to have correctly assessed the California definition of materiality. *Id.* at 528. *Rubio* reiterated the California Supreme Court definition from *People v. Pierce, supra,* and other cases, to hold that the correct definition of a false material statement is one that "could probably have influenced the outcome" of the proceeding in which it is uttered. *Id.* at 528.

For petitioner to claim, relying on the *en banc* dissent, that "the *en banc* majority's definition of 'materiality' rested upon a complete misreading of prior state cases" (Pet. 16, n.7), is itself a gross misreading of California case law. As the recent *Rubio* case reiterates, the "could probably" standard is the correct definition in California. As *Rubio* notes, the "might have" language is the *second prong* of California Penal Code section 123's requirement of proof for the offense of perjury, and the decision in *Kobrin* referenced the "might have" second component of Penal Code section 123 perjury requirement. It did not establish a new definition of materiality.

> We do not think that *Kobrin* requires a different result. As authority for its statement that materiality means "whether the statement or testimony 'might have been used to affect [the proceeding in or for which it was made],'" the Supreme Court cited *Pierce* and section 123. In our view, neither *Pierce* nor section 123 supports such a broad definition of materiality. *Pierce* defines materiality as a false statement that could probably influence the outcome of the proceeding. Section 123 states a false statement must be "material, and might have been used to affect" the proceeding. (Italics added.) The use of the conjunction "and" in section 123 denotes dual requirements: (1) The false statement must be material, and (2) the

> false statement must have been used in a fashion that might have affected the proceeding. We do not believe the sentence should be read as providing a definition for material.[7] *Id.* at 528.

Thus, California courts before, during and after respondent Chein's trial have ruled that the materiality element definition requires proof that a statement "could have influenced" the outcome of the case.

The County, having assessed the counts of conviction with its erroneously broad "might have influenced" definition of materiality, has failed to cite the extensive case law correctly defining materiality and the dual requirements of Penal Code section 123. The *en banc* majority was quite correct in its recapitulation of the California law.

Given that the sufficiency of evidence issue petitioner raises is premised on its erroneous definition of the materiality element of the offense, it hardly makes a case for error, much less an issue worthy of review.

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[7] *People v. Kobrin*, 903 P.2d 1027(1995), held that materiality was a question for the jury under the guidance of this Court's decision in *U.S. v. Gaudin*, 515 U.S. 506 (1995), and *People v. Hedgecock, supra. People v. Feinberg,* 60 Cal. Rptr. 2d 323 (1997), relied on by the *en banc* dissent, is a case where no definition of materiality was given by the trial court and the appellate court merely noted the *Kobrin* quote and the *Pierce* definition. Neither case "defined" materiality, as the dissent erroneously suggests. A.-142-143, n.2. *Kobrin,* for example, merely cited the "might" language of Penal Code section 123 and then cited to its own opinion stating the "could have" definition in *People v. Pierce, supra.*

CONCLUSION

It is respectfully requested that the County's petition for *certiorari* be denied.

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Respectfully submitted,

CHARLES M. SEVILLA
LAW OFFICE OF CHARLES SEVILLA
Attorney for Edmund Chein